(4)

No. 99-731

Supreme Court, U.S.
FILED
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In the Supreme Court of the United States

SHAMMARA RICHARDS, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the district court and court of appeals correctly held that the *Feres* doctrine bars petitioner's FTCA action because at the time of the accident in question, petitioner's decedent was on active duty with the military, was within the confines of the Fort Knox military reservation, and was driving from his on-base duty station to his on-base quarters.

2. If the *Feres* doctrine applies to this case, whether the doctrine should be modified to be inapplicable in such circumstances.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-10a) is reported at 176 F.3d 652. The order of the court of appeals denying the petition for panel rehearing and rehearing en banc and the dissent from the denial of rehearing en banc (Pet. App. 11a-12a) are reported at 180 F.3d 564. The opinion of the district court (Pet. App. 13a-23a) is reported at 1 F. Supp.2d 498.

JURISDICTION

The judgment of the court of appeals was entered on May 5, 1999. A petition for rehearing was denied on June 30, 1999. On September 17, 1999, Justice Souter

extended the time within which to file a petition for a writ of certiorari to and including October 28, 1999. The petition for a writ of certiorari was filed on October 28, 1999. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. On June 26, 1995, petitioner's husband, a private in the United States Army, was killed when his personal automobile was struck by an Army truck. The accident occurred while he was driving toward the main post area of Fort Knox, Kentucky from his duty station, the Cullen Maintenance Facility, which is located in the Carpenter Test Area on the Fort Knox base, a few miles from the main post. See C.A. App. 79-80. For purposes of ruling on the government's motion to dismiss, the district court and court of appeals assumed, without deciding, that petitioner's husband was driving toward his home, which was located at the main post area at Fort Knox. See Pet. App. 2a n.1, 15a.

The accident occurred within the confines of the Fort Knox military base on Kentucky Highway 1638, a public road that runs through an easement of land the Army has granted to the State of Kentucky. See C.A. App. 83-85. Although it is used by the public, it is the main route between the Cullen Maintenance Facility and the main post area of Fort Knox. See C.A. App. 80.

2. Petitioner filed suit against the United States under the Federal Tort Claims Act (FTCA), 28 U.S.C. 1346(b) and 2671 *et seq.*, alleging that her husband died "as a direct and proximate result of * * * the negligence of the United States Army and its employees." Pet. App. 28a. She alleged that her husband's death was caused by the Army's failure to maintain properly the Army truck, and by the Army's negligent supervi-

sion of the soldier who was driving the truck. See *id.* at 30a-31a.

The district court dismissed the complaint under the *Feres* doctrine, see *Feres* v. *United States*, 340 U.S. 135 (1950), which bars FTCA suits by or on behalf of soldiers for injuries arising out of or incurred in the course of activity incident to military service. Pet. App. 23a. The district court noted that to determine whether an injury is incident to military service, "courts consider the totality of the circumstances including: (1) the service member's duty status; (2) the situs of the injury; (3) and the activity the service member was performing." *Id.* at 16a. Those factors generally support a *Feres* bar "when an active status service member is injured in a vehicular accident on a military reservation." *Id.* at 18a. Moreover, the court found that the rationales for the *Feres* doctrine apply here: it avoids judicial intrusion into military affairs; it avoids subjecting a federal relationship to the fortuities of state law; and it instead provides uniform compensation in the form of federal benefits to the family of the military employee. See *id.* at 19a-22a. Therefore, the *Feres* doctrine barred petitioner's suit.

3. The Third Circuit affirmed the dismissal of petitioner's complaint for essentially the same reasons as the district court. Analyzing the totality of the circumstances to determine if her husband's injury was incident to military service, the Third Circuit held *Feres* applicable because the accident occurred within the confines of the Fort Knox military base as petitioner's husband was driving home from his on-base duty station. See Pet. App. 7a. Rehearing en banc was denied, with four judges dissenting on the ground that the *Feres* doctrine should be reconsidered. See *id.* at 11a-12a.

ARGUMENT

The decision of the court of appeals is correct and consistent with the decisions of every other circuit. In determining whether injuries are incident to service, see *Feres* v. *United States*, 340 U.S. 135 (1950), all courts of appeals evaluate the same factors in light of the "totality of the circumstances," as this Court directed in *United States* v. *Shearer*, 473 U.S. 52 (1985), and in light of the rationales for the *Feres* doctrine.

In this case, the district court and court of appeals followed those black-letter rules and reached a result that properly reflects the important rationales of the *Feres* doctrine. Indeed, all the courts of appeals that have considered the factual context presented here agree that *Feres* applies where a soldier was injured while on active duty, inside the confines of a military base, and while present at the scene of the accident because of his or her military status. This Court generally does not grant further review to reexamine the application of settled judicial doctrines to the facts of particular cases, and nothing about this case warrants departure from that practice.

Nor is further review appropriate to reexamine the *Feres* doctrine itself. This Court reaffirmed the *Feres* doctrine in *United States* v. *Johnson*, 481 U.S. 681, 686-688 (1987). The courts of appeals have faithfully followed the standards this Court has established for applying *Feres*. Modifying the doctrine at this time would upset almost 50 years of precedent, ignore Congress's repeated refusal to amend the *Feres* doctrine, disrupt the uniform system of statutory benefits the political branches have designed for service members, and otherwise seriously interfere with the military mission.

1. Petitioner contends that the courts of appeals are applying different legal tests to determine whether a service member's injury is incident to service under the *Feres* doctrine. See Pet. 11-14. An examination of the cases on which petitioner relies, however, reveals no conflict.

In *Feres* v. *United States*, 340 U.S. 135 (1950), this Court held that the FTCA does not authorize service members to bring tort suits against the government for injuries that "arise out of or are in the course of activity incident to service." *Id.* at 146. Several years later, the Court expressly stated what the lower courts had already understood about applying *Feres*'s "incident to service" test: "The Feres doctrine cannot be reduced to a few bright-line rules; each case must be examined in light of the [FTCA] as it has been construed in *Feres* and subsequent cases." *United States* v. *Shearer*, 473 U.S. 52, 57 (1985). In all cases, "the *Feres* doctrine has been applied consistently to bar all suits on behalf of service members against the Government based upon service-related injuries." *United States* v. *Johnson*, 481 U.S. 681, 687-688 (1987).

Contrary to petitioner's suggestion (Pet. 12-14), all the courts of appeals take the totality of the circumstances approach *Johnson* and *Shearer* require, examining a number of factors to determine whether an injury is incident to service under *Feres*.[1] Moreover,

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[1] See, *e.g.*, *Fleming* v. *United States Postal Serv.*, 186 F.3d 697, 699-700 (6th Cir. 1999) (following *Shearer*'s case-by-case approach); *Whitley* v. *United States*, 170 F.3d 1061, 1070 (11th Cir. 1999) (court must "evaluat[e] the totality of [relevant] factual circumstances"); *Day* v. *Massachusetts Air Nat'l Guard*, 167 F.3d 678, 682 (1st Cir. 1999) ("No single element in the [*Feres*] equation * * * is decisive."); *Stewart* v. *United States*, 90 F.3d 102, 104-105 (4th Cir. 1996) (discussing numerous factors in holding *Feres* appli-

the courts of appeals analyze the same basic factors in determining whether an injury is incident to service. These factors include, among others, the service member's military status (whether on active duty or on leave) at the time he or she was injured,[2] the location of the accident (whether off base or on base),[3] the activity in which the service member was involved at the time,[4] whether the service member was subject to military control and/or discipline at the time of injury,[5] and whether the activity arose out of military life.[6]

The fact that a service member was on active duty and engaged in activity related to his military obligations when he was injured implicates the distinctively federal relationship between a soldier and the military, which is one of the rationales underlying the *Feres* doctrine. See *Stewart* v. *United States*, 90 F.3d 102, 104-105 (4th Cir. 1996). The location of an accident also can be an important factor, because an on-base location tends to confirm that the accident arose out of military

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cable); *Miller* v. *United States*, 42 F.3d 297, 301 (5th Cir. 1995) (*Feres* requires "a case-by-case assessment of the totality of the circumstances"); *Stephenson* v. *United States*, 21 F.3d 159, 162 (7th Cir. 1994) (citing *Shearer* for proposition that *Feres* is subject to no "bright-line rules" and that each case is "entitled to an independent examination"); *Verma* v. *United States*, 19 F.3d 646, 648 (D.C. Cir. 1994) (citing *Shearer* and considering numerous factors); *Shaw* v. *United States*, 854 F.2d 360, 363 (10th Cir. 1988) (holding that "the totality of the facts and circumstances surrounding the accident and * * * injuries brings the *Feres* doctrine into play").

[2] See, *e.g.*, *Stewart*, 90 F.3d at 104.

[3] See, *e.g.*, *Whitley*, 170 F.3d at 1070; *Shaw*, 854 F.2d at 363.

[4] See, *e.g.*, *Stewart*, 90 F.3d at 104; *Shaw*, 854 F.2d at 363.

[5] See, *e.g.*, *Whitley*, 170 F.3d at 1074; *Stephenson*, 21 F.3d at 162-163.

[6] See, *e.g.*, *Day*, 167 F.3d at 682; *Verma*, 19 F.3d at 648.

life; and the military has the authority to regulate what occurs on a military reservation. See *Flowers* v. *United States*, 764 F.2d 759, 761 (11th Cir. 1985). The above considerations explain why, under circumstances like those in this case, courts have concluded that only "in the event of the *rarest coincidence*," would the injured service man have been "in the same place at the same time with the same purpose, had it *not* been incident to his active status in the military." *Shaw* v. *United States*, 854 F.2d 360, 363 (10th Cir. 1988)(emphasis added). See also Pet. App. 19a.

Petitioner contends (Pet. 11-14) that the courts of appeals disagree on the extent to which courts should consider the rationales underlying the *Feres* doctrine in determining whether any particular injury is incident to service. The district court in this case, however, correctly summarized the courts of appeals' approach to that issue. If the totality of the circumstances clearly supports applying *Feres*, it is unnecessary to scrutinize independently *Feres*'s rationales to determine that an injury is incident to service. See *Day* v. *Massachusetts Air Nat'l Guard*, 167 F.3d 678, 682-683 (1st Cir. 1999); *Verma* v. *United States*, 19 F.3d 646, 648 (D.C. Cir. 1994); Pet. App. 16a. That makes sense because the rationales are "incorporated in" the factors courts consider in applying the "incident to service" test. *Miller* v. *United States*, 42 F.3d 297, 302 (5th Cir. 1995) (considering service member's military status, location of accident, and activity at time of injury to decide whether FTCA suit would require courts to second-guess military decisions). Moreover, this Court has specifically cautioned courts against analyzing *Feres*'s rationales in lieu of applying the "incident to service" test. See *United States* v. *Stanley*, 483 U.S. 669, 682-683 (1987).

By contrast, if the totality of the circumstances does not unambiguously support applying the *Feres* doctrine in a given case, then courts review the rationales underlying the doctrine to verify that allowing the suit would not significantly impair the military mission. See Pet. App. 17a. Thus in *Smith* v. *United States*, No. 99-1397, 1999 WL 1005303, *3 (7th Cir. Nov. 5, 1999), the court held that *Feres* barred a claim that the military failed to prevent a drill sergeant from engaging in sexual relations with a subordinate, because resolution of the claim would have required second-guessing military judgments regarding supervision and control of service members. Similarly in *Stephenson* v. *United States*, 21 F.3d 159, 164 (7th Cir. 1994), the court held that *Feres* barred a claim that the military failed to prevent one service member from injuring another because of possible interference with military decision making. On the other hand, in *Fleming* v. *United States Postal Service*, 186 F.3d 697, 700-701 (6th Cir. 1999), the court declined to apply *Feres* in an action by a service man against the Postal Service for an accident that had occurred miles from the base while the service man was getting breakfast, and where none of the *Feres* rationales were implicated.[7]

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[7] The only apparent departure from this settled doctrine is *Taber* v. *Maine*, 67 F.3d 1029 (2d Cir. 1995). Instead of applying *Shearer*'s totality of the circumstances approach, *Taber* focused on whether the plaintiff was "engaged in activities that fell within the scope of the plaintiff's military employment," as the scope of employment concept is understood under the Federal Employers Compensation Act (FECA), 5 U.S.C. 8102. 67 F.3d at 1050 & n.21. However, no other court has adopted the *Taber* approach. And the Second Circuit has since followed the traditional analysis to determine whether an injury is incident to service stating "*Taber* does not and could not * * * in any way alter the reach of the

This decisional process is consistent with this Court's application of the *Feres* doctrine. *Shearer*, for example, involved an FTCA suit brought by the widow of a service member who was killed by another soldier away from the military base while both service members were off duty. 473 U.S. at 53. This Court held that *Feres* barred *Shearer's* suit because the allegations of the complaint would have required a court to second-guess military judgments regarding the supervision and control of service members. *Id.* at 57-59. Avoiding such interference with military decision making is one of the core *Feres* rationales. See *Johnson*, 481 U.S. at 690-691. At bottom, petitioner's claimed discrepancy (Pet. 12-14) between those courts that simply apply factors, and those that apply factors in light of the *Feres* rationales, is a distinction without a difference.

2. Petitioner incorrectly asserts that her case would have been decided differently in another circuit. Pet. 14-17. In cases that are "factually similar" to this one (Pet. 17), where a soldier was injured while on duty, while inside the confines of a military base, and while en route to an on-base destination, courts have held that *Feres* bars an FTCA action. See, *e.g.*, *Stewart*, 90 F.3d 102; *Shaw*, 854 F.2d 360; *Flowers*, 764 F.2d 759.

The cases cited by petitioner (Pet. 14-17) are readily distinguishable. For example, as the Third Circuit observed (Pet. App. 6a), the accident in *Troglia* v. *United States*, 602 F.2d 1334, 1335 (9th Cir. 1979), occurred on a public road located *outside* the confines of the military

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Feres doctrine." *Wake* v. *United States*, 89 F.3d 53, 61 (2d Cir. 1996). In *Wake*, the Second Circuit implicitly repudiated the *Taber* approach by applying *Feres* to bar the FTCA claim of a service member who was ineligible for FECA benefits precisely because the Department of Labor concluded that her injury was outside the scope of her military employment. See *Wake*, 89 F.3d at 56, 61.

base. See also *Fleming*, 186 F.3d at 700 (service member off base when automobile accident occurred); *Green* v. *Hall*, 8 F.3d 695, 700 (9th Cir. 1993) (same), cert. denied, 513 U.S. 809 (1994); *Mills* v. *Tucker*, 499 F.2d 866, 868 (9th Cir. 1974) (same). In three other cases petitioner cites, the service member was on leave (or in a status tantamount to leave) when he was injured. See *Elliott* v. *United States*, 13 F.3d 1555, 1561, vacated, 28 F.3d 1076, judgment of dist. ct. aff'd by an equally divided court, 37 F.3d 617 (11th Cir. 1994); *Pierce* v. *United States*, 813 F.2d 349, 353 (11th Cir. 1987) (per curiam); *Parker* v. *United States*, 611 F.2d 1007, 1013-1014 (5th Cir. 1980).[8] In *Feres* itself, this Court distinguished a prior case, *Brooks* v. *United States*, 337 U.S. 49 (1949), on the ground that the service member in *Brooks*, whose FTCA action was not barred, was on leave when he was in an automobile accident on a public highway. See 340 U.S. at 146.

As the courts in this case found, petitioner's husband was within the Fort Knox base because he was driving from his on-base duty station to his on-base quarters. Pet. App. 7a, 18a-19a. His activity at the time of his death indisputably arose from his military career. Under this Court's decisions, and in any circuit, petitioner's action would be barred.

3. Finally, no further review is warranted to reexamine the *Feres* doctrine. In *United States* v. *Johnson*, 481 U.S. 681 (1987), this Court expressly reaf-

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[8] Other cases petitioner cites are similarly distinguishable. *Lutz* v. *United States*, 944 F.2d 1477 (9th Cir. 1991), involved harassment that was completely unrelated to the plaintiff's military service. See *id.* at 1486-1487. In *Dreier* v. *United States*, 106 F.3d 844 (5th Cir. 1997), the service member was on military property for reasons unrelated to his military service, in the same position as any civilian would have been. See *id.* at 853.

firmed the *Feres* doctrine noting that it has never deviated from *Feres* and its "incident to service" test in the decades since it was articulated and that Congress has never modified the doctrine. *Id.* at 686. The Court "decline[d] to modify the doctrine at this late date." *Id.* at 688.

Johnson reiterated that the *Feres* doctrine is supported by three important rationales. First, because "the relationship between the Government and members of its armed forces is distinctively federal in character," it "makes no sense to permit the fortuity of the situs of the alleged negligence to affect the liability of the Government to [the] serviceman." 481 U.S. at 689 (citations and quotations omitted). Second, "[t]hose injured during the course of activity incident to service not only receive benefits that compare extremely favorably with those provided by most workmen's compensation statutes, but the recovery of benefits is swift and efficient, normally requiring no litigation." *Id.* at 690 (citations and internal quotation marks omitted). Third, "suits brought by service members against the Government for injuries incurred incident to service are barred by the *Feres* doctrine because they are the types of claims that, if generally permitted, would involve the judiciary in sensitive military affairs at the expense of military discipline and effectiveness." *Ibid.* (citations and internal quotation marks omitted).

Since *Johnson* was decided, the Court has repeatedly denied petitions for certiorari urging that *Feres* be reexamined. In *Sonnenberg* v. *United States*, No. 90-539, the United States filed a Brief in Opposition explaining why further review to reexamine the *Feres* doctrine is unnecessary in light of *Johnson* and for various other reasons. See Brief for the United States in Opposition, *Sonnenberg* v. *United States*, No. 90-539. Since the

Court denied certiorari in *Sonnenberg*, see 498 U.S. 1067 (1991), the United States thereafter has waived a response in cases where the only question presented in a petition is whether *Feres* should be reexamined.

The government's Brief in Opposition in *Sonnenberg* responds fully to the arguments petitioner advances in seeking reexamination of the *Feres* doctrine here. Courts have had little difficulty applying the *Feres* doctrine, which is "alive and well," *Duffy* v. *United States*, 966 F.2d 307, 312 (7th Cir. 1992), and has been "broadly and persuasively applied by the federal courts," *Stewart*, 90 F.3d at 104 (internal quotation marks omitted).

Moreover, courts have extended the *Feres* doctrine to other areas of the law. For example, in the same term *Johnson* was decided, this Court extended *Feres*'s "incident to service" test to *Bivens* claims. See *United States* v. *Stanley*, 483 U.S. 669, 683-684 (1987). Other courts have applied the *Feres* doctrine to service-related claims brought under 42 U.S.C. 1983 (Supp. III 1997), see *Day*, 167 F.3d at 683-684 & n.3 (citing cases), and to FTCA claims alleging injuries to foreign service members, see *Whitley*, 170 F.3d at 1078. See also *Bois* v. *Marsh*, 801 F.2d 462, 470-471 (D.C. Cir. 1986) (*Feres* applies to intentional as well as negligent tort claims against individual military personnel). Thus, *Feres*'s "incident to service" test is hardly unworkable or in decline.

Furthermore, the *Feres* doctrine ensures that all service members—including those injured in combat abroad or in their quarters at home—receive a uniform set of benefits for service-related injuries, at a level determined by Congress and the Executive Branch. Compensation is awarded uniformly to all service members who are similarly situated, without regard to

whether their injuries were incurred in training, in combat, or while receiving benefits.[9] That uniformity is an indispensable part of maintaining high morale among all our military forces.[10] In sum, the *Feres* doctrine is necessary to the military mission and fair to service members.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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DECEMBER 1999

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[9] The FTCA specifically bars suits arising in foreign countries or in combat. 28 U.S.C. 2680(k) and (j).

[10] The benefits Congress has provided service members compare favorably to the workers' compensation programs applicable to civilian employees. See *Johnson*, 481 U.S. at 689-690. For example, petitioner and her children are entitled to $1225 per month in Dependency and Indemnity Compensation from the Veterans Administration, to Dependent Education Assistance, to $150,000 under the Servicemen's Group Life Insurance policy, and to a statutory $6000 death gratuity. See Brief for Appellee at 19-20; C.A. App. 124-125.